In the Supreme Court of the United States

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JULIA ROGERS, PETITIONER

v.

LEROY LOETHER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in response to this Court's order of March 19, 1973, inviting the Solicitor General to express the views of the United States with respect to the pending petition for certiorari. We conclude that the petition should be granted because of the importance of the issue presented to the proper administration of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619 (hereinafter the "Fair Housing Act"), and because the decision below is erroneous.

1. The question presented here is whether a suit brought by an aggrieved individual pursuant to Section 812 of the Fair Housing Act, 42 U.S.C. 3612, for

injunctive relief,[1] damages, and attorneys' fees, is properly triable to the court sitting without a jury. While Section 813 of the Act authorizes suits by the Attorney General to enjoin discriminatory housing practices, "complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante* v. *Metropolitan Life Insurance Company*, 409 U.S. 205, 209. Cf. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402. But even in the most favorable circumstances private litigation may encounter substantial difficulties. The prospective tenant who has been turned away on account of race often has an immediate need for housing that may have to be satisfied elsewhere unless

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[1] Petitioner originally sought injunctive relief and damages (Pet. App. 13a-14a). After the court issued a preliminary injunction restraining rental of the apartment, however, petitioner secured alternative housing and disclaimed any further need for injunctive relief (Pet. App. 1a, 14a). Accordingly, at the time the district court considered defendant's request for a jury trial, only the issues of damages and attorneys' fees remained.

The courts below, however, viewed respondents' request for a jury trial on the basis of the prayer for relief which, as in most fair housing cases, had sought both injunctive and monetary relief. The court of appeals stated in its opinion that (Pet. App. 25a):

> [W]e share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

We believe this Court should approach the case the same way. (If the decision of the court of appeals had been predicated on the abandonment of the claim for injunctive relief, the situation might be regarded as so atypical that review would not be appropriate—especially in light of the propriety of awarding some form of injunctive relief, if requested, as well as damages, to a complainant in petitioner's circumstances.)

prompt relief is available. The victim of discrimination may therefore have little sustained incentive to prosecute a lawsuit fully, especially since fair housing litigation generally is not financially rewarding to plaintiffs or their attorneys. Thus, as this type of litigation becomes more complex, lengthy and costly, the effectiveness of private enforcement of the Fair Housing Act diminishes.

Yet if the decision below is permitted to stand, private litigants seeking to enforce their rights under the Fair Housing Act will be confronted with the complications and uncertainties that inhere in a jury trial. Proceedings will become more complex and expensive and will take longer than equity actions tried to the courts alone. And this in turn will impair the "important role" that private litigation plays in vindicating the rights guaranteed by the Fair Housing Act. *Trafficante* v. *Metropolitan Life Insurance Company, supra,* 409 U.S. at 211.

While this is the first case in which the jury trial issue has been decided by a court of appeals, several district courts have considered the question and have reached conflicting results.[2] Also, in *United States* v. *Reddoch,* 467 F. 2d 897 (C.A. 5), the court held that no jury trial is available in "pattern or practice" cases brought by the Attorney General pursuant to Section 813 and relied in part on the district court decision in the present case. The courts of appeals have also held, in decisions criticized by the court below (Pet. App.

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[2] The district courts in the present case and in *Cauley* v. *Smith,* 347 F. Supp. 114 (E.D. Va.), held that no jury trial is available. The courts in *Kastner* v. *Brackett,* 326 F. Supp. 1151 (D. Nev.), and *Kelly* v. *Armbrust,* 351 F. Supp. 869 (D. N.D.), reached the opposite result.

28a), that no jury trial is available[3] under the equal employment opportunity laws in Title VII of the Civil Rights Act of 1964.[4] Review by this Court is therefore appropriate here in order to avoid uncertainty and to ensure the effectiveness of the private remedy established by Congress in the Fair Housing Act.

2. In part, the court of appeals rested its decision on the language of Section 812(c) (Pet. App. 31a-33a). In our view, however, there is no basis for concluding that Congress contemplated the use of juries in private actions under the Act. To the contrary, Section 812(c) speaks exclusively in terms applicable to a trial before a judge sitting without a jury.

Thus, Section 812(c) provides:

> The *court* may grant as relief, as it deems appropriate, any permanent or *temporary injunction, temporary restraining order,* or other order, and may award to the plaintiff actual damages and not more that $1,000 punitive damages, together with *court costs* and *reasonable attorney fees* in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the *court* is not financially able to assume said *attorney's fees.* [Emphasis added.]

The italicized words above either explicitly refer to a judge, rather than a jury, or deal with matters that

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[3] *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (C.A. 5); *Harkless* v. *Sweeny Independent School District*, 427 F. 2d 319, 324 (C.A. 5), certiorari denied, 400 U.S. 991; *McFerren* v. *County Board of Education*, 455 F. 2d 199 (C.A. 6); *Smith* v. *Hampton Training School*, 360 F. 2d 577 (C.A. 4). See also *Hayes* v. *Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49 (S.D. Ga.).

[4] 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 1983.

are uniformly confided solely to judges. The words "the court" at the beginning of the sentence are the only possible subject of the phrase "may award to the plaintiff actual damages and not more than $1,000 punitive damages." There is no mention of "verdict," which only a jury can issue. Moreover, Section 812(c) is specifically designed to give the district judge discretion to decide among the available alternative forms of relief—"the court may grant as relief, as it deems appropriate."

In light of all this, it is apparent that Congress intended that private enforcement of the Fair Housing Act would be conducted in suits tried by the court sitting without a jury. Indeed, the court below conceded that the argument that Section 812 does not contemplate jury trials is "persuasive but not compelling" (Pet. App. 31a).[5]

3. Relying on *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, the court of appeals based its construction of Section 812(c) to require jury trials on the doctrine that statutes should be so construed as to avoid grave constitutional problems (Pet. App. 33a). We believe,

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[5] The court of appeals suggested that the use of the phrase "punitive damages" itself implies that a jury is appropriate. However, this divorces the phrase from its context, since the provision is addressed to the court's discretion and carries a statutory limit of $1,000. Moreover, in employment discrimination cases, courts have awarded back pay totaling hundreds of thousands of dollars in non-jury trials. See, *e.g.*, *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791 (C.A. 4) (award of back pay granted for period of many years). See, also, *United States* v. *Virginia Electric and Power Co.*, C.A. No. 638-70-R (E.D. Va. 1971) (consent order) (back pay of approximately $250,000). There is nothing in the nature of punitive damages as a form of relief that implies the use of a jury.

however, that the court exaggerated the constitutional difficulty of permitting disposition of this issue by a judge alone.

In *Katchen* v. *Landy*, 382 U.S. 323, a case not cited by the court below, this Court held that a claimant in bankruptcy who was charged with having committed a voidable preference was not entitled to a jury trial. This Court reaffirmed its prior holdings that "equity courts have the power to decree complete relief and for that purpose may accord what would otherwise be legal remedies." 382 U.S. at 338. With respect to the contention that *Dairy Queen* and *Beacon Theatres* required a contrary result, this Court stated that the rule of those cases "is itself an equitable doctrine," adding that (382 U.S. at 339):

> In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

Katchen v. *Landy* means, at least, that Congress has constitutional authority to confide to a court of equity, sitting without a jury, the authority to grant monetary as well injunctive relief for violations of rights created by statute. Thus, under the Seventh Amendment, the mere possibility of monetary recovery does not automatically require that a jury trial be available.[6]

As in *Katchen*, Section 812(c) is part of a "statutory scheme contemplating the prompt trial of a disputed

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[6] Even before this Court's decision in *Katchen*, a court of appeals had expressly rejected the contention that *Dairy Queen* converted all claims for money damages into legal rather than equitable claims. *Swofford* v. *B & W, Inc.*, 336 F. 2d 406, 414 (C.A. 5).

claim without the intervention of a jury" (382 U.S. at 339), and should be analyzed accordingly. Section 814 of the Act, 42 U.S.C. 3614, expressly requires expedition of proceedings in cases brought by private parties under Section 812. Particularly in light of the prime importance of private suits in securing compliance with the Act, and the deleterious effect that the complications and uncertainties inherent in jury trials would have on the prosecution of these cases by litigants and their attorneys (see pp. 2-3, *supra*), we believe that a division of fair housing cases into "equitable" portions to be tried by the court alone and "legal" segments to be allocated to a jury would frustrate the efficient administration of the Act, and of its provisions for expedition.[7]

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition for a writ of

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[7] In *Hayes* v. *Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49, 52-53 (S.D. Ga.), the court, in denying a jury trial on an analogous claim for back pay, analyzed the practical problems as follows:

> Defendant maintained on oral argument that the proper procedure in this case would be to try the back pay or money judgment phase before a jury and then for the Court to proceed to decide whether racial discrimination exists in employment practices and whether defendant should be enjoined. To give such direction to Title VII cases would, in my view, thwart the will of Congress and to an extent frustrate the purposes of the legislation. Further and alternatively, it is hard to conceive of a more chaotic method of district court handling of an EEO case than for the judge to hold a non-jury trial, as he must, on the racial discrimination charges under the injunctive and declaratory relief features and thereafter refer to a jury the issue of back pay after a repetition of the same evidence.

certiorari and should reverse the judgment of the court of appeals.

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